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No. 344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

PUGET SOUND POWER & LIGHT COMPANY, a corporation,
Appellant,

vs.

THE CITY OF SEATTLE, a municipal corporation,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

A. C. VAN SOELEN,
Corporation Counsel.

WALTER L. BAUMGARTNER,
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515 County-City Building,
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THE ARGUS PRESS - SEATTLE

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This litigation is here for review of a judgment of the Supreme Court of the State of Washington affirming a judgment and decree of dismissal by the trial court after sustaining a general demurrer to the amended complaint (R. 63, 37). The trial court also ordered paragraph XVI (R. 9), embodying conclusions of law and fact, stricken (R. 33, 34) but no point is made of it here. Companion to this case are the related cases respectively entitled, *The Pacific Tel. & Tel. Co. v. The City of Seattle*, No. 364, October Term, 1933, and *Seattle Gas Co. v. City of Seattle*, No. 359, said term.

Were the facts in this case not "novel," in the

sense that no prior adjudication of similar facts has been made by this court, appellant would have no standing here whatever.

Bared of surplusage, legal and factual conclusions and repetitions, the pleaded facts, with proper inferences therefrom, and judicial knowledge present the following case.

The appellant is a Massachusetts utility corporation, the appellee a municipal corporation and a city of the first class of the State of Washington. They will sometimes be referred to herein as the Power Company or the Company, and the City, respectively.

Their present differences arose over the adoption by the City of, and its consequent attempt to enforce against the appellant, the provisions of Ordinance No. 62662 imposing a license or occupation tax upon persons, firms and corporations, and upon itself, for the privilege of engaging in the business of selling electric light and power in the City, measured by three per cent of the total gross income from such business in the City.

These taxes commenced to accrue July 1, 1932, when the appellant applied for, by the filing of a return of its gross income for the year 1931, the required license and paid under protest (R. 27) the sum of $9697.75 (R. 8), the first monthly installment of its tax. Thereafter it filed the complaint herein (R. 1) seeking in a first cause of action the recovery of the amount so paid and in a second cause of action an injunction against the collection of any further amounts.

The City accepted appellant's return of its gross

income without question, and asserted claim to further monthly installments of tax computed thereon (R. 16).

The power of the City of Seattle to adopt such a revenue measure was first conferred upon it in 1890 (Session Laws of the State of Washington, 1889-90, pp. 215, 223, cl. Thirty-third; *Fleetwood v. Read* (1899) 21 Wash. 547) and has ever since been retained by it (Rem. Rev. Stat., § 8966, cl. Thirty-third; *Pac. Tel. & Tel. Co. v. Seattle*, 72 Wash. Dec. 503 (R. 48)).

In 1890 the Legislature authorized any incorporated city or town within the State to construct or purchase and maintain "gas works or electric light plants for the purpose of lighting streets and public places and supplying lights to the inhabitants of such cities and towns, with full authority to regulate and control the same" (Session Laws of the State of Washington, 1889-90, p. 520). This authority was amplified in 1899 (Session Laws, State of Washington, 1899, p. 250, Ch. 78) appearing with subsequent amendments as Rem. Rev. Stat., §9488, *et seq.*

In the exercise of the power and authority so conferred, the City on March 4, 1902, by popular vote, committed itself to the acquisition or construction and operation of a light plant and system for the purpose of furnishing light and power to itself and its inhabitants (R. 5) and is still maintaining and operating that enterprise (R. 1, 2).

For the purpose of initiating the said plant and system, the City issued general obligation bonds, of which the principal sum of $1,447,000 is still out-

standing (R. 5). It is significant that the record is silent in regard to payment by the City of any of such general bonds out of general tax moneys although lawfully payable therefrom.

The development of the major portion of the system has been financed by the issuance and sale of utility revenue bonds, of which the principal sum of approximately $32,852,000 is still outstanding, which bonds are payable only out of the gross revenues received by the City from the sale of electric light and power. The gross revenues are devoted entirely to the maintenance and operation of the system and the payment of the principal and interest of the bonds. It is not shown whether the City realizes more than sufficient for these purposes, notwithstanding that it possesses "full authority to regulate and control the use, distribution and price" of electricity sold by it "for lighting, heating, fuel and power purposes, public and private" (Rem. Rev. Stat., §9488).

The City, naturally, is its own customer for electric current for street lighting and other municipal and governmental purposes (R. 3). In obedience to duty enjoined upon it by law (Rem. Rev. Stat., Title 64, Ch. 6, §9953) the City annually transfers from its tax supported General Fund to the light utility revenue fund a sum determined upon after public hearing (Rem. Rev. Stat., Title 60, Ch. 9, §9000-16; Aplt's Br. pp. 100, 101) to be the "true and full value" of the electric current so used. The amount set aside in the 1932 budget for this purpose was $438,750.00 (R. 3).

Under the Washington Constitution, adopted in 1889, before the appellant, or its predecessors, entered the utility business in Seattle all of the City's property, as well as that of the State and United States, whether governmental or proprietary, is exempted from taxation as property (Washington Constitution, Art. VII, § 2, and Amendment 14).

On March 12, 1902, a few days *after* the City had adopted its first ordinance inaugurating its own light plant, the appellant's franchise, known as the Shuffleton Franchise, was granted by the City by Ordinance No. 7894 and was accepted by the grantees on March 27, 1902. The grantees were given the right, privilege and authority to construct, maintain and operate equipment and apparatus for an underground electric system and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power *in, over and under the streets, alleys and public places of the City* for a term of fifty years, ending in 1952 (R. 3, 4). Pursuant to the franchise the grantees, and later the appellant, constructed and acquired power plants and distribution facilities which have since been continuously operated (R. 4).

The City has no power or control over the rates for electric current sold by the Company. The Company fixes its own rates (Rem. Rev. Stat., §§ 10363, 10364, 10365), subject, however, to change by the Washington Department of Public Works, the utility regulatory body, upon complaint and after hearing (*Idem*, § 10390).

Inescapably the appellant and the City are com-

petitors in the same field within the City for light and power customers and solicit the same, one from the other and from the open field. Consequently the rates of both have been, and are, the same (R. 3). The record shows no "coercion" of customers by either.

It was in the circumstances just described and under the necessity of raising revenue to maintain its governmental functions that the City adopted its Ordinance No. 62662, the validity of which is here assailed. It is set out in part in the record herein at page 18 and in full in the records of related cases No. 359 (R. 21) and No. 364 (R. 14), October Term, 1933. It is also set out in full in Appendix A hereto.

EPITOME OF APPELLANT'S ARGUMENT

To assist the reader in more easily grasping the issues, we epitomize appellant's argument.

First: Seattle Ordinance No. 62662, in so far as it imposes an occupation or license tax upon the appellant, is repugnant to the equal protection clause of the Fourteenth Amendment, because the same or a similar tax is not in fact or in law imposed upon the City, appellant's competitor in the light and power business, there being under the circumstances no reasonable ground for classification.

Second: The questioned tax upon appellant, notwithstanding a similar tax is laid upon the City, will deny appellant equal protection and will constitute a taking without compensation, and a deprivation without due process, of appellant's property, in violence of the Fourteenth Amendment. The ordinance will have this effect because—

Transfer of funds from the City's Light Fund to its General Fund in satisfaction of its tax is not a payment in fact;

Any tax paid by the appellant to the City will subsidize the City's light and power enterprise to the eventual confiscation and spoilation of appellant's business and property; and

The ordinance provision for inspection by City officers of books and records required to be kept by appellant for the purpose of verifying the amount of taxes due will result in disclosure of business secrets, of which the City will take unfair advantage.

Third: The ordinance requirement that appellant secure an occupation license as a condition to the

continuance of its business in the city impairs the obligation of the franchise contract granting appellant the right to operate its light and power plant and system and contravenes Article I, Section 10, of the Constitution.

Fourth: The ordinance definition of "gross income" is so vague, indefinite and uncertain as to deny due process vouchsafed by the Fourteenth Amendment.

SUMMARY OF APPELLEE'S ARGUMENT

First: The ordinance applied to appellant does not transgress the equal protection clause of the fourteenth amendment because—

A. Under the ordinance both the appellant and the City are taxed;

B. If the tax upon the City is ineffective, it is due to want of power in that behalf. Impotence in respect to itself does not also render the City impotent in dealing with the power company. If paramount law operates in favor of a portion of a class, in this case the City, the Fourteenth Amendment does not afford the remainder of that class, in this case the Power Company, a refuge against the exercise of the power to tax;

C. If the tax upon the City is ineffective, the City's situation and the inherent differences between appellant's and the City's utility are sufficient to sustain a tax upon the one and not the other.

Second: The charge that the city, in enforcing the tax against appellant, even though the city meets the tax upon itself, will deny appellant equal protection of the laws, take its property without compensation, deprive it of its property without due process, is not sensibly founded upon any provision of the ordinance or any fact or circumstance in the record or elsewhere. The charge is supported only by the appellant's expression of fear and apprehension, which cannot avail, for—

A. Equity does no allay mere fear and apprehension.

B. Conjectural future abuse of the power of taxa-

tion under the provisions of the ordinance, is no denial of the existence of the power exerted.

Third: The ordinance requirement that appellant secure an occupation license as a condition to its continuance in the pursuit of its business in the city does not impair any obligation of its franchise contract.

A. The ordinance does not penalize the failure to obtain the license except as a mode of collecting the tax and is, therefore, not an unlawful interference with the contract.

B. Appellant's franchise is neither a license of such character as authorizes it to carry on the light and power business in the City nor an exemption from license or occupation taxation.

C. In any event, the City never had, nor has it, any authority to contract away its power of taxation.

Fourth: The ordinance definition of "gross income" as applied to appellant is neither in fact nor in law vague, indefinite or uncertain.

ARGUMENT

In approaching the problems presented in this appeal, we will be pardoned for harking back to a review of the attitude of this Court toward local legislation and judicial decision supporting it.

> "But whatever the tribunal, in questions of this kind great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *Lochner v. New York*, 198 U. S. 45, 58, *et seq.*, 49 L. ed. 937, 942, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133. But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the great reluctance that it feels to interfere with the deliberate decisions of the highest court of the state whose people are directly concerned. *Welch v. Swasey*, 214 U. S. 91, 106, 53 L. ed. 923, 930, 29 Sup. Ct. Rep. 567. The reluctance must be redoubled when, as here, the opinion of that court confirms a specific determination concerning the same spot, previously reached by the body that made the law. See *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 341, 45 L. ed. 879, 888, 21 Sup. Ct. Rep. 625; *Smith v. Worcester*, 182 Mass. 232, 234, 235, 59 L. R. A. 728, 65 N. E. 40.
>
> "But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this

bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the supreme court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinions still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief."

Laurel Hill Cemetery v. San Francisco (1910) 216 U. S. 358, 365, 54 L. ed. 515, 519.

Ordinances, as other laws, stand before the bar of justice clothed with a presumption of validity and the burden is upon him who asserts their infirmity.

Zahn v. Bd. Pub. Wks., 274 U. S. 325, 71 L. ed. 1074;

Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 265, 281, 53 L. ed. 176, 186.

First: The ordinance applied to appellant does not transgress the equal protection clause of the Fourteenth Amendment because—

A. Under the ordinance both the appellant and the City are taxed;

B. If the tax upon the City is ineffective, it is due to want of power in that behalf. Impotence in respect to itself does not also render the City impotent in dealing with the Power Company. If paramount law operates in favor of a portion of a class, in this case the City, the Fourteenth Amendment does not

afford the remainder of that class, in this case the Power Company, a refuge against the exercise of the power to tax;

C. If the tax upon the City is ineffective, the City's situation and the inherent differences between appellant's and the City's utility are sufficient to sustain a tax upon the one and not the other.

A. UNDER THE ORDINANCE BOTH THE APPELLANT AND THE CITY ARE TAXED.

Were it not for the manifest effort of the City and its officers to be fair in according the same treatment to the appellant and the City's utility, we would be inclined to rest content with appellant's protestations that the tax upon the City's utility is futile, since we will later show that the futility, if any, cannot work to appellant's advantage. The ordinance provides:

> "Section 5. Occupations Subject to Tax—Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:
>
> * * * * * *
>
> "(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the

license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

"(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

* * * * * *

"Section 6. City of Seattle Subject to Tax: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance." (R. 20)

Of the enactment in Section 6, the Washington Supreme Court said:

"The city, in its proprietary capacity, is in competition with appellant in the power and light business. The possible consequences to appellant, if it is subjected to an excise of three per cent on its gross revenues, while its competitor escapes the burden, are too obvious for discussion. Evidently having such consequences in mind the city council, by virtue of § 6 of the ordinance, has undertaken to subject the city's power and light business to the tax imposed

upon persons and corporations engaging in that business.

"This is merely a more or less friendly gesture. The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met as though § 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom.

"Conceding, for the sake of argument, that to be the situation, counsel for the city seek to sustain the tax against appellant under the doctrine that constitutional limitations on the taxing power do not prevent a reasonable classification of persons and occupations subject to the tax; and that a privately owned light and power business is subject to a different classification than one owned by a municipality—that the one may properly be subjected to the excise and the other exempted.

> "In passing, it is to be noted that the ordinance is a good faith exercise by the city of its power to impose excise taxes for the purpose of raising revenue. Some half dozen businesses enjoying peculiar privileges in and upon the streets of the city are included within its purview. The fact that it imposes a burden upon appellant not borne by the city in its competing business, is an incident and not the purpose of the ordinance." (R. 40, 41; 72 Wash. Dec. 519, 521)

We regret to say that the pronouncement concerning the City's liability for the tax was made without benefit of full presentation by counsel for the City who felt, in view of established legal principles, that any effort to demonstrate the validity of the tax upon the City was more or less immaterial.

If this pronouncement were decisive of the point discussed, this Court would feel itself bound. It is evident, however, that the Washington court merely speculated without intent to decide. The statement that the City had not allocated, and probably could not allocate, any of the revenues of its power and light business to the payment of the tax by reason of the supposed prior lien on such revenues in favor of outstanding utility revenue bonds was taken from the appellant's complaint (R. 5, 6; Complaint, Par. IX). There never has been a decisive judicial determination of the status of utility revenues with respect to the supposed lien, although the matter has been in litigation. Light upon the character of this lien is shed by the opinion of Circuit Judge Hunt

appearing in 29 Fed. (2d) 254, where in a suit by the present appellant against the present appellee, attempt was made to establish utility revenue bonds almost identical with those at bar as a prior lien upon gross revenues. The Circuit Court there held, however, that the pledge of gross revenues to the payment of the bonds did not create a lien *in gross* on all such revenues.

The observation of the Washington court—"Conceding that the City's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance,"—is obviously not decisive.

It was not necessary to set up such machinery because both the City Charter and the State budget law for cities supply it. It appears from Article IX, Section 17, of the Seattle City Charter, quoted at page 100 of appellant's brief, that the City Council may transfer funds from the City's Light Fund to the City's tax supported General Fund to meet the tax. Under the terms of the budget law (Rem. Rev. Stat., Title 60, Ch. 9) Section 9000-18 thereof, the City Council is directed after the budget is made up, wherein it may include an item chargeable to the light utility fund for payment of the tax, to not later than the 15th day of December "appropriate the specific amounts to the several departments as herein specified, and the several heads of departments, boards and officers shall thereafter be author-

ized to expend such sums so appropriated for the purposes stated in said ordinance in the proper administration of the city's affairs." When the amount has been so appropriated for the tax, it falls to the administrative officers to respect the appropriations and to obey the provisions of the tax ordinance in question. If the State should exact a similar privilege tax of the City, its payment would be effected in exactly the same manner though the taxing act contained no machinery to enable the City to respond.

The failure of the City Council to set up in the 1932 budget an item for payment of the tax is excusable, since the ordinance imposing it was neither conceived nor in existence at the time that budget was being framed. However, this failure did not prevent the payment of the tax, since it was chargeable to, and was charged against, the items for operation in the respective utility budgets.

We state, in passing, that these utility taxes, whether considered as charges to operation or capital account, may not be met by a resort to the City's tax supported General Fund.

Asia v. Seattle, 119 Wash. 674; 206 Pac. 366;

Twichell v. Seattle, 106 Wash. 32; 179 Pac. 127.

We are moved by another consideration which impels the conculsion that the tax is laid upon the City as well as upon the appellant. When a city essays to fix utility rates for its own utilities and others, it is wielding the police power and is as much bound thereby as are others.

City of Seymour v. Texas Elec. Service Co. (C. C. A., Aug. 28, 1933) 68 Fed. (2d) 814, 817;

City of Farmersville v. Texas-Louisiana Pr. Co. (Oct. 29, 1932, unreported) 55 S. W. (2d) 195;

Inc. Town of Mapleton v. Iowa Pub. Service Co. (1929) 209 Iowa 400, 223 N. W. 476, 68 A. L. R. 993;

Inc. Town of Sibley v. Ocheyedan Elec. Co., 194 Iowa 950, 187 N. W. 560;

Economic Gas Co. v. City of Los Angeles, 168 Cal. 448, 143 Pac. 717.

In the *Seymour* case, *supra*, Judge Hutcheson, writing the decision, said:

> "It is, that though in owning and operating a utility plant a city acts not in a governmental but in a proprietary capacity, when the council, exerting the power to regulate, comes to fix rates it represents not the city, as proprietor, but the state, as regulator. It exerts not the contractual power of the city, but the sovereign power of the state." (Citing cases)

If this be so as to the police power, it must also be true of the taxing power.

B. IF THE TAX UPON THE CITY IS INEFFECTIVE, IT IS BECAUSE OF WANT OF POWER IN THAT BEHALF. IMPOTENCE IN RESPECT TO ITSELF DOES NOT ALSO RENDER THE CITY IMPOTENT IN DEALING WITH THE POWER COMPANY. IF PARAMOUNT LAW OPERATES IN FAVOR OF A PORTION OF A CLASS, IN

THIS CASE THE CITY, THE FOURTEENTH AMENDMENT DOES NOT AFFORD THE REMAINDER OF THAT CLASS, IN THIS CASE THE POWER COMPANY, A REFUGE AGAINST THE EXERCISE BY THE CITY OF ITS POWER TO TAX.

Since, as we have just seen, it is both practicable and lawful for the City to pay the tax without setting up the machinery therefor in the ordinance, any failure of the ordinance to bind the City in respect to the tax upon it must result from the operation of a higher law in protection of the utility revenue bondholders. If this Court should so conclude, though we doubt that it will in view of the fact that it is reluctant to determine so grave a question as a collateral issue, especially in the absence of important facts, yet in the light of prior decisions of this court, the City is not by the equal protection clause of the 14th Amendment forestalled, estopped or restrained from taxing the appellant, though it be a competitor of the City. If, in the matter of the tax, the City must defer to constitutional provisions prohibiting the impairment of contract obligations with bondholders, the City is not guilty of discrimination against, or denial of equal protection to, the appellant. It has done all within its power to place itself and the appellant on a parity.

In *Raley & Bros. v. Richardson*, 264 U. S. 157, 159, 68 L. ed. 615, 616, this Court, through Mr. Justice Sutherland, wrote:

> "There is nothing in the contention that, because, under the construction placed upon the statute by the state courts, the tax falls upon

those engaged in domestic business, and does not fall upon those engaged in interstate business, it is void for inequality. It would be a strange application of the equality provision of the 14th Amendment to say that because a state is forbidden by a paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the state observe the rule of equality among the persons subject to its taxing power."

Mr. Justice MacReynolds, in *Union Bank & Trust Co. v. Phelps*, 288 U. S. 181, 187, 77 L. ed. 687, 690, wrote:

"To accept the doctrine that as the States can only tax a Federal instrumentality when permitted by Congress, therefore they cannot tax competitors of such instrumentalities within their general jurisdiction in some other fashion without violating the Fourteenth Amendment, would be both illogical and destructive of their proper independence."

Des Moines Nat'l Bank v. Fairweather, 263 U. S. 103, 116, 117, 68 L. ed. 191, 199, 200;

Williams v. Walsh, 222 U. S. 415, 420, 56 L. ed. 253, 255;

Brooks v. State (Unreported) 58 S. W. 1032;

State v. Thomas Cruse Savings Bank, 21 Mont. 50, 52 Pac. 733.

In the *Brooks* case, *supra*, the Texas court wrote:

"It is not within the limits of the authority

of the state to levy an occupation tax upon national banks. The fact that the state has no authority to enforce the law against national banks does not make it void for the want of uniformity. It is equal and uniform on the same class of subjects within the limits of the authority of the state to tax."

Let us for a moment approach the question from another angle. Suppose the City, assuming power to do so, had granted in a franchise contract an exemption from license taxation to electric utility Corporation A. Imagine further that Corporation A was competing in the same business with Corporation B which was not favored with such exemption. Could it be successfully contended that the City had, under the 14th Amendment, disqualified itself from exacting a revenue license of Corporation B? The question is easily answered in the negative in view of the above cases.

C. If the Tax Upon the City Is Ineffective, the City's Situation and the Inherent Differences Between Appellant's and the City's Utility Are Sufficient to Sustain a Tax Upon the One and Not Upon the Other.

Closely akin to the principle just discussed is the rule that in levying taxes classifications may be made for the purpose of levying different amounts upon different classes or to exempt one class and tax the other if there be a reasonable basis for the distinctions made. We interject parenthetically to point out that legislative classification presupposes power to

deal with all subjects to be classified. If it is found that the City may not, because of its situation, impose the tax upon itself and yet taxes the appellant, the only subjects in the field in the light and power business, the result is that *by operation of law* a classification is created.

In *Packer Corp. v. Utah*, 285 U. S. 105, 76 L. ed. 643, it appeared that the Utah legislature prohibited cigarette and tobacco advertising in that state. After its supreme court had held such prohibition void as applied to newspaper advertising circulated in other states, the legislature amended the act to exclude advertising in newspapers and periodicals from the operation of the act. In the decision sustaining the act as against a billboard advertiser claiming denial of equal protection, Mr. Justice Brandeis said (285 U. S. 109):

> "The classification alleged to be arbitrary was made in order to comply with the requirement of the Federal Constitution as interpreted and applied by the highest court of the state. Action by a state taken to observe one prohibition of the Constitution does not entail the violation of another (citing cases). It is a reasonable ground of classification that the state has power to legislate with respect to persons in certain situations and not with respect to those in a different one."

In support of the classification which results if the appellant be correct as to the tax upon the city, the Washington Supreme Court relied, among other authorities, upon the decision in *South Carolina Power*

Co. v. South Carolina Tax Com. (denial of interloctory injunction affirmed, 286 U. S. 525, 76 L. ed. 1268; affirmed on merits under title of *Broad River Power Co. v. Query*, 288 U. S. 178, 77 L. ed. 685) in the following language:

> "In the case of *South Carolina Power Co. v. South Carolina Tax Commission*, 52 Fed. (2d) 515, a statutory three judge court applied this rule to the identical problem with which we are here confronted. An act of the legislature imposing an excise on persons and companies generating electricity by hydro-electric and steam power was under consideration. The act contained the following proviso:
>
> " 'Provided, *further*, that the provisions of this Act shall not apply to municipalties manufacturing or generating electricity for the use of its customers.'
>
> "In answer to the contention that this was an unreasonable classification, Mr. Justice Parker, speaking for the court, said:
>
> " 'So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its operations are conducted, not for private profit, but for the benefit of the public or its citizens. *Irvine v. Town of Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the Four-

teenth Amendment. See *Village of Hardwick v. Wolcott*, 98 Vt. 343, 129 A. 159, 39 A. L. R. 1222 and note'."

The appellant seeks to demonstrate that the decision in the *South Carolina* case is not pertinent, on the ground that in that state municipal corporations in the operation of municipal light plants are immune from actions for injuries caused by negligence in that pursuit, held by the state court to be governmental in character. We submit that whether a municipal electric light plant be regarded as a governmental or a proprietary function, it tenders to its private competitors the same problems. So far as appellant is concerned, there is no magic in the word "governmental" applied to a city light plant.

In *Giant Tiger Corp. v. Bd. of Com'rs. of Trenton* (Sept. 27, 1933) 168 Atl. 309, the New Jersey supreme court sustained an ordinance of the city imposing license taxes upon the business of operating public markets, exempting open air markets, the only one of which was operated by the city.

In *Springfield Gas & Elec. Co. v. City of Springfield*, 257 U. S. 66, 69, 66 L. ed. 131, 133, this Court, speaking through Mr. Justice Holmes, decided that there were sufficient distinctions between publicly and privately-owned electric plants to sustain an act of the State of Illinois placing only the privately-owned plants under the jurisdiction of its Public Utility Commission as to rates. The plaintiff there made the same argument advanced here, to which the Court answered:

"The plaintiff's argument, shortly stated, is

that, in selling electricity, the city stands like any other party engaged in a commercial enterprise, and that to leave it free in the matter of charges while the plaintiff is subject to the public utilities board is to deny to the plaintiff the equal protection of the laws. But we agree with the Supreme Court of the State that the difference between the two types of corporation warrants the different treatment that they have received.

"The private corporation, whatever its public duties, is organized for private ends, and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to a public body, and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must. * * * But the fact that the municipality owned the plant for which its counsel fixed the rate was supposed to disqualify its officers, at least when other plants were submitted to the judgment of strangers. But a city council has no such interest in the city's electric plant as to make it incompetent to fix the rates. Whatever the value of the distinction between the private and public functions of the municipality, the duty of its governing board in this respect, as we have

said, is public and narrowly fixed by the act. * * *."

In 1920, while Seattle was operating its municipal railway system, it adopted an ordinance regulating the operation of certain kinds of for-hire motor vehicles upon the city's streets. Plaintiffs in *Schoenfeld v. Seattle*, 265 Fed. 726, objected to the ordinance on the ground, among others, that the City could not exercise its power of regulation to affect beneficially its proprietary interest. Judge Neterer, writing the opinion for the statutory three-judge court, said at page 731:

> "There is no merit in the contention that the city, being the owner of the street car system in the city, acts in relation to this issue in its proprietary or business relation, and that in such relation it has a status as an individual or private corporation, and may not for the purpose of advancing its proprietary or business interest legislate with relation to the use of the street by the plaintiff, where the result of such legislation would affect beneficially its proprietary interest. The proprietary relation of the city does not take from it the power to exercise in its governmental function to say whether the operation of 200 'jitney busses' upon the streets occupied by street car lines should be regulated with relation to the common use of such streets by the public. What has been said disposes of the further contention that the city is powerless to legislate with relation to the fares."

Well known principles of law do not recognize

competition as a bar to classification of competitors. Reference is made to:

State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 75 L. ed. 1248;

Heisler v. Thomas Colliery Co., 260 U. S. 245, 67 L. ed. 237;

Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350;

Armour Pkg. Co. v. Lacey, 200 U. S. 226, 50 L. ed. 451;

Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619.

If the City's General Fund should suffer the loss of the tax due from its Light Fund, that ought not to release the appellant from its obligation.

Southern Realty Corp. v. McCallum (C. C. A.) 65 Fed. (2d) 934, 937.

Statutory discrimination in favor of a certain class is not arbitrary if the discrimination is founded upon reasonable distinctions. This is judicial and legislative dogma. Distinctions between public and private utilities in the City of Seattle abound:

1. Between the appellant and the City there is no difference in respect to the product each sells. But the City's plant and system is operated for service—not for profit, while the sole aim of appellant's enterprise is profit.

2. If any surplus, or so-called profit, accrues to the City, the same may be used only for corporate uses and purposes in the state, the benefit of which accrues, in part, at least, to the appellant. Appellant's profits accrue to its stockholders, many of

whom are nonresidents of the state and whose share of profits do not reach the channels of trade in the state.

3. The appellant is owned and controlled by stockholders, whose only interest in the business is profit, and who, conceivably residents of Africa, Boston, New York or South America, have little or no interest in the civic and community life of the City. On the other hand, City light is owned by that nameless and ever changing mass of citizens organized as the City of Seattle. These citizens are, for the most part, taxpayers and home owners. They have no interest in the City light except to see that it furnishes service.

4. The City may borrow money for its enterprises only in the manner pointed out by the statutes and its charter. It may not borrow for its utilities upon its promissory note. The appellant may borrow money at will, either by notes or bond issues, the terms of which are fixed by the borrower and the lender.

5. The City is not authorized to sell its product, except surplus, if any, outside its corporate limits. (*Municipal League of Bremerton v. Tacoma*, 166 Wash. 82). Appellant may sell its product in or out of the state, wherever it finds a profitable market.

6. The City is bound by statute and charter provisions in the making of its contracts for construction. The appellant is free to contract as it wills.

7. The City's proprietary enterprise is governed and supervised by public officers with fixed terms who are elected and appointed according to law. They

may or may not be in sympathy with public enterprise. Appellant's officers may be hired and discharged at will. Loyalty is the price of their bread.

8. The City may not avail itself of the bankruptcy laws to avoid overwhelming financial burdens. Appellant has this privilege.

9. The City may not own or hold stock in subsidiary or auxiliary lighting or gas companies or acquire control of them for the purpose of overcoming competition or for the purpose of forming a business alliance for the sale of light or power to them.

10. The City makes its own rates for electrical energy. The appellant makes its own rates subject to change by the Washington Department of Public Works upon complaint and after hearing.

11. The state has power over the rights and property of cities, whether held in a governmental or proprietary capacity, which is unrestricted by the contract, due process or equal protection clauses of the Federal Constitution. (*Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937; *Newark v. New Jersey*, 262 U. S. 192, 67 L. ed. 943). The state has no such power over private utility corporations.

Notwithstanding the competition between public and private electric utilities and in recognition of differences between them, Congress on June 16, 1933 (c. 96, § 6(a), 48 Stat. 256), asserting its power of classification, imposed only upon private electric utilities an excise tax in the amount of 3% of the price for which electrical energy is sold for domestic or commercial consumption. The section appears in

U. S. C. A., Title 26 (1933 Sup.) as Section 616 and reads in part as follows:

> "(a) There is hereby imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the commissioner, with the approval of the secretary, shall prescribe * * *.
>
> "(c) * * * None of the provisions of this section shall apply to publicly owned electric and power plants."

Is Congress disqualified to adopt the above act or to levy excise taxes upon the sale by private power companies of electrical energy at wholesale because by the Act of May 18, 1933 (See c. 32, § 1, *et seq.*, 48 Stat. 58, *et seq.*) it created the Tennessee Valley Authority with power to maintain and operate the Muscle Shoals plant and to sell electrical energy at wholesale to states, counties, municipalities and others, to be resold at retail? (c. 32, § 10, 48 Stat. 64). (U. S. C. A., Title 16, §§831, 831i, 1933 Sup.) And are each of the states, counties or cities to which the Authority sells energy for resale at retail disqualified from exercising the police and taxing powers over private competitors? Will this disqualification also extend to the Federal Government's contemplated production and sale of power at the Roosevelt Dam, at the Coulee Dam, at the Bonneville Dam?

Did Congress disable itself from taxing or policing its competitors in the transportation business when it entered the Alaska railway field and the inland

waterways transportation field through the Inland Waterways Corporation? (U. S. C. A., Title 49, §§ 141, 142).

Because a state makes shoes or binder twine or produces farm products in its penal or correctional institutions which it afterwards sells in the open market, is it to be estopped or disqualified to tax or police its competitors because of a supposed inequality under the 14th Amendment?

The ramifications of the doctrine contended for by the appellant here are too complex and too far reaching for adoption by this or any other court in a country which has known discouraging tariffs for private benefit for upwards of an hundred years.

The foregoing considerations and authorities can lead but to the conclusion that the ordinance tax upon the appellant is valid, whether the same exaction is made of the city utility or not.

Second. **The charge that the city, in enforcing the tax against appellant, even though the city meets the tax upon itself, will deny appellant equal protection of the laws, take its property without compensation, and deprive it of its property without due process, is not sensibly founded upon any provision of the ordinance or any fact or circumstance in the record or elsewhere. The charge is supported only by the appellant's expression of fear and apprehension, which cannot avail, for—**

A. Equity does not allay mere fear and apprehension.

B. Conjectural future abuse of the power of taxa-

tion under the provisions of the ordinance is no denial of the existence of the power exerted.

In initiating the argument upon its second proposition, appellant (Br. p. 48) would have this Court believe that the Washington court had decisively disposed of the tax upon city light, and quotes the court:

> "So the problem must be met as though Section 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom."

Appellant seems to have forgotten the court's language preceding and following this quotation. It is:

> "* * * The city has not allocated, and *probably cannot allocate*, any of the revenues of its light and power business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. *Conceding* that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes (*sic*) to cover the excise provided for in the ordinance."

Here follows the quotation referred to by appellant. The court continues:

> "*Conceding, for the sake of argument*, that to

> be the situation, counsel for the city seek to sustain the tax against appellant under the doctrine that constitutional limitations on the taxing power do not prevent a reasonable classification * * *." (R. 41; 72 Wash. Dec. 521, 522) (Italics ours)

Do the words "probably cannot allocate," "conceding that the city's light and power revenues could be subjected to the tax," and "conceding, for the sake of argument, that to be the situation" even faintly stir conviction in the reader's mind that the court intended to be decisive? Did not the court merely accept the legal conclusions and inferences from partial facts stated in the amended complaint for the purpose of disposing of the demurrer?

In this connection, let us not forget that the court also said:

> "In passing, it is to be noted that the ordinance is a good faith exercise by the city of its power to impose excise taxes for the purpose of raising revenue. Some half(?) dozen businesses enjoying peculiar privileges in and upon the streets of the city are included within its purview. The fact that it imposes a burden upon appellant not borne by the city in its competing business, is an incident and not the purpose of the ordinance." (R. 41)

A. Equity Does Not Allay Mere Fear and Apprehension

"In the first place," says appellant at page 51 of its brief, "the whole theory of a city taxing itself

seems to constitute nothing more than a mental mirage. There is no reality or substance to support the theory." Appellant mistakes reality for mirage. The City can, and may if it so desires, maintain rates sufficient only to pay maintenance and operation (treating the city light tax as an operating charge) and light utility debt service. This course does not appeal to the appellant, for it complains that the City did not increase its rates to meet the tax (R. 10; Complaint, Par. XX). Or the City can, and may if it desires, increase its allowance for operation and maintenance in an amount sufficient to meet the tax and raise its rates. This would find more favor with our adversary. In any event, however accomplished, the City may transfer from the Light Fund to the tax supported General Fund the amount of the tax which, in the absence of the instant ordinance, it is under no obligation to do and which, on the contrary, it is positively restrained from doing (Rem. Rev. Stat., § 9953, later herein quoted from). When it meets this self-imposed obligation, the benefit accrues to the appellant and to other property taxpayers. Is this reality or is it mirage?

"In the second place," forecasts appellant (Br. p. 51), "under the facts of this case there would and could be no actual payment by the city," and then proceeds to describe in detail by what legerdemain the City could and would shear the lamb. By means of ostensible payments for light and power used for street lighting and other general purposes, the City could and would tranfer out of the General Fund back into the City Light Fund an amount equal to

the city light tax. But there are two preventives for such chicanery.

At the commencement of budget making time, on or before July 10th of each year, the heads of all city departments, including utilities, are required, under penalty, to submit to the finance committee of the city council estimates of probable expenses of their several departments for the ensuing year. Such estimates must be made up in form and manner prescribed by the state auditor and be segregated into (a) operating and maintenance expenses and (b) capital or betterment outlays (Rem. Rev. Stat., § 9000-14). Upon the assembling of these estimates, the council must, on or before the first Monday in September, proceed with the consideration thereof "*during which consideration all persons interested shall be given an opportunity for a thorough and complete discussion of the items stated therein.*" After the hearings, the council must "adopt and cause to be *published once each week for two successive weeks a full and complete copy*" of the budget. Before the first Monday in October, the council must further consider the estimates "*at which hearings all persons interested shall be given an opportunity for discussion and suggestions.*" (Rem. Rev. Stat., § 9000-16). At or before said time, the council must finally adopt the budget, after which no changes can be made (Rem. Rev. Stat., §§ 9000-16, 9000-17). Under penalty no officer is permitted to incur any liability for a purpose or beyond that provided in the budget (Rem. Rev. Stat., § 9000-22).

In view of the provision for two public hearings on

the budget and the publication in full thereof in the official newspaper, will any *elective* city council hazard an increase in general tax rates by paying city light more for electrical energy than is reasonable or than it is worth merely for the purpose of causing the tax of the appellant to appear *bona fide?*

The second preventive appears in the act providing for a uniform system of accounts for all public offices (Rem. Rev. Stat., Title 64, Ch. 6). It is therein provided:

> "§ 9953. Separate Accounts for Each Fund. * * * Separate accounts shall be kept for each department, public improvement, undertaking, institution and public service industry under the jurisdiction of every taxing body, and of the state, and all service rendered by, or property transferred from, one department, public improvement, undertaking, institution or public service industry to another, *shall be paid for at its true and full value by* the department, public improvement, undertaking, institution or public service industry receiving the same, and no department, public improvement, undertaking, institution or *public service industry shall benefit in any financial manner* whatever by an appropriation or fund made for the support of another department, public improvement, undertaking, institution or public service industry.'
>
> "§ 9954. Separate Accounts for Public Service Industries. Separate accounts shall be kept for every public service industry which shall show the true and entire cost of the ownership

and operation thereof, the amount collected annually by general or special taxation for service rendered to the public and the amount and character of the service rendered therefor, and the amount collected annually from private users, if any, for service rendered to them, and the amount and character of the service rendered therefor." (Italics ours).

Other provisions of the Act adequately assure obedience (Rem. Rev. Stat., §§ 9955-9958).

How long, under the open methods of doing public business provided by the foregoing statutes, does appellant believe that elective city officers could successfully resort to the legerdemain and chicanery described through the pages of its brief from pages 50 to 55, inclusive, and 63 to 79, inclusive, and all for the intentional injury of the appellant?

The truth is that by reason of the recently adopted limitations upon the power of the state and its agencies to tax property (Ch. 4, Laws of Washington, 1933), and because of the financially weakened condition of the general property taxpayer who hitherto has carried nearly the whole burden of the cost of government, the city authorities were compelled both to reduce expenses and to seek new sources of revenue.

Being limited to the power to license for revenue, the City naturally adopted an occupation or privilege tax to solve its problem. That the ordinance is a good faith exercise of this power was recognized by the Washington court and is apparent upon the face of the ordinance. Some twelve different lines of

business, significantly all conducted in or on public streets without compensation, including its own *water* and *light* utilities, were selected as proper subjects. There is nothing in the record, nor could there be, which even hints at an attempt to use this tax as a club against the appellant or any other taxpayer or to indicate bad faith in any respect.

It is to be presumed that a state in enforcing its local policies will conform its requirements to the Federal guaranties, and any doubt will be resolved in favor of, and not against, the state.

Corporation Commission v. Lowe, 281 U. S. 431, 74 L. ed. 945.

The Washington court characterized the ordinance under review as "a good faith exercise by the city of its power to impose excise taxes for the purpose of raising revenue. * * * The fact that it imposes a burden upon appellant not borne by the city in its competing business, is an incident and not the purpose of the ordinance." (R. 41)

The Los Angeles ordinance considered in *Los Angeles Gas & Electric Co. v. City of Los Angeles*, 241 Fed. 912 (affirmed, 251 U. S. 32), strongly relied upon by the appellant (Br. 55, 56), is in direct contrast with the ordinance at bar. The former was upon its face a direct thrust by purported exercise of the police power against the private power company expressly for the aggrandizement of the City's electric system. It is clear, however, from the decisions in both the District Court and on appeal to this Court that if a real necessity, grounded upon protection of the public peace, health and safety, had

motivated the city council in adopting the ordinance, it would nevertheless have been sustained though it might incidentally have benefited the city enterprise. The case is therefore not an authority in support of the appellant here.

The gist of the appellant's argument in support of its second proposition is nothing other than the expression of fear and apprehension—anxiety over threatened injury without the allegation of a single supporting fact. There is abundant authority that mere apprehension of future injury is insufficient ground for relief by injunction, as also where the injury is doubtful or contingent. There must be a reasonable probability of real injury, in the absence of which injunction will be refused.

Lehmann v. State Board, 263 U. S. 394, 68 L. ed. 354, presents a case where this Court refused to enjoin a state board merely on the ground of supposed wrongful action by it, saying:

> "Official bodies would be of no use as instruments of government if they could be prevented from action by the supposition of wrongful action."

This Court, in *Connecticut v. Massachusetts*, 282 U. S. 660, 75 L. ed. 602, held that—

> "Injunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future."

In *New York v. Illinois*, 274 U. S. 488, 71 L. ed. 1164, this Court said:

> "The suit is one for an injunction, a form of

relief which must rest on an actual or presently threatened interference with the rights of another."

In *New Jersey v. Sargent*, 269 U. S. 328, 70 L. ed. 289, it was held that a mere allegation to enjoin the enforcement of an Act of Congress that a state would be deprived by such enforcement of revenue from leasing of its land was not sufficient to sustain jurisdiction for injunction where no facts were stated showing that the Act was being, or about to be, applied in a way which did or would encroach on or prejudicially affect the state's right.

In *Des Moines v. Des Moines Gas Co.*, 264 Fed. 506 (C. C. A.) this appears:

"The court should not anticipate legislative action and fix its limitations for the future * * *. It cannot be assumed in advance that the city might adopt other ordinances, the enforcement of which would deprive the company of a reasonable return for the employment of its property in the public service."

"Injunctions go only in cases of urgent necessity, so made to appear by competent, material, credible and preponderating evidence to guard against injuries, not merely feared by the applicant but reasonably to be apprehended, and likely to be irreparable."

G. N. Ry. Co. v. Local Great Falls Lodge, etc., 283 Fed. 557.

"Before an injunction can issue against an officer or tribunal for threatened acts alleged

to be injurious, some official steps toward the performance of the act claimed to be injurious must be alleged and shown."

Barber County v. Smith, 48 Kan. 331, 29 Pac. 565;

Seward County v. Stoufer, 47 Kan. 287, 27 Pac. 1000.

See, also:

P. S. P. & L. Co. v. City of Seattle (C. C. A.) 29 Fed. (2d) 254, 257;

City of Seattle v. P. S. P. & L. Co. (C. C. A.) 284 Fed. 659, 662 (Certiorari denied, *P. S. P. & L. Co. v. City of Seattle*, 262 U. S. 743, 67 L. ed. 1210).

14 R. C. L., "Injunctions," § 57;

32 C. J., "Injunctions," § 22.

That the appellant would not be without its remedy in equity if the fears expressed in its brief arrived at the point of reality is manifest from *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220. The court observed:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

See, also:

Bradley v. City of Richmond, 227 U. S. 477, 483, 57 L. ed. 603, 606.

B. Conjectural Future Abuse of the Power of Taxation Under the Provisions of the Ordinance Is No Denial of the Existence of the Power Exerted.

The appellant argues that, under the circumstances of this case, the court should deny to the City Council, under the Fourteenth Amendment, the power to impose a privilege tax upon appellant, either by means of the ordinance at bar or any other ordinance, so long as the City is a competitor, merely because it indulges the prophesy that the Council will abuse the power.

> "The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied."
>
> Justice McKenna in *City of Joplin v. S.W. Mo. Light Co.*, 191 U. S. 150, 48 L. ed. 127.

Besides, the claim of repugnancy to the Constitution can not be supported by mere speculation or conjecture.

> *Hodge Drive-It-Yourself Co. v. Cincinnati*, 284 U. S. 335, 76 L. ed. 323.

Of possible abuse of the taxing power, this Court many years ago said:

> "Counsel for plaintiff in error contend that if the power of the City of East St. Louis to exact a license fee of $100 from every ferry-boat is conceded, the City could double or treble the fee at will. It is sufficient to say, in reply to this, that it does not follow from the fact that a power is liable to abuse that it does not exist.

If the power is abused, the remedy is with the Legislature."

Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 376, 27 L. ed. 419, 424.

"We need not consider whether abuses of the power (to tax) might go to such a point as to transcend it (the Constitution), for we have not such a case before us. The acts (taxing statutes of Alaska) must be judged by their contents, not by the allegations as to their purpose in the complaint."

Holmes, J.—for the court in *Alaska Fish Salt. & B. P. Co. v. Smith*, 255 U. S. 44, 48, 49, 65 L. ed. 489, 495.

Judge Cooley, in his inimitable work entitled "The Law of Taxation," 4th edition, at page 1132 of Volume 2, points out that the liability to abuse or the possibility of the abuse of the taxing power is no denial of the existence of that power.

"Every authority, however indispensable, may be abused, and if it might not, it would be powerless for good."

Kirby v. Shaw, 19 Pa. St. 258, 260;

Ould & Carrington v. Richmond, 23 Gratt. (Va.) 464; 14 Am. Rep. 139.

"It has been strongly urged that this power is peculiarly liable to abuse. It is liable to be abused; perhaps peculiarly so. But so is all government, and all governmental powers. Yet government is nevertheless a necessity among men. It is a very bad government indeed which is not better than the inevitable anarchy and outrage

which follow the absence of all government. And the fact that a power is liable to be abused affords no conclusive argument against it."

Reeves v. Wood County Treasurer, 8 Ohio St. 333.

Suggestion is made that the provisions in Section 16 (R. 23) of the ordinance conferring power upon the City Comptroller to inspect appellant's books and records constitute an unlawful invasion of its privacy. However, the right to impose taxes carries with it the power to make reasonable regulations for collection.

Yu Cong Eng v. Trinidad, 271 U.S. 500, 525, 70 L. ed. 1059, 1069;

Wingfield v. So. Car. Tax Com., 147 So. Car. 116, 144 S. E. 846;

Howe v. Barto, 12 Wash. 627.

Further suggestion is made, we presume in view of the right of a taxpayer to appeal to the City Council, that the City will act as witness, prosecutor, judge, jury and executioner to the eventual elimination of appellant. But the presumptions that the City will not act fairly and impartially are all the other way.

Home Telph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 279, 53 L. ed. 176, 185.

Third. **The ordinance requirement that appellant secure an occupation license as a condition to its continuance in the pursuit of its business in the city does not impair any obligation of its franchise contract.**

A. The ordinance does not penalize the failure to

obtain the license except as a mode of collecting the tax and is therefore not an unlawful interference with the contract;

B. Appellant's franchise is not a license of such character as authorizes it to carry on the light and power business in the City nor an exemption from license or occupation taxation;

C. In any event, the City never had, nor has it, any authority to contract away its power of taxation.

A. THE ORDINANCE DOES NOT PENALIZE THE FAILURE TO OBTAIN THE LICENSE EXCEPT AS A MODE OF COLLECTING THE TAX AND IS THEREFORE NOT AN UNLAWFUL INTERFERENCE WITH THE CONTRACT.

In the first place, if the appellant's franchise be considered a license from the City to engage in the light and power business in the City, the revenue license required by the ordinance is not of such a character as to interfere with, or destroy, the franchise license. This has been made plain by prior decisions of this Court.

We refer first to the case of *Royall v. Virginia*, 116 U. S. 572, 29 L. ed. 735, decided in 1886. Under the laws of Virginia, no person could without a license practice as an attorney and every attorney at law, in addition to being incensed, sworn and admitted to the bar, was required as a condition precedent to obtain a revenue license. The State had issued certain bonds with coupons attached under the provisions

of an act which provided that the bonds and coupons should be received in payment of taxes, debts, dues and demands due the State. Royall tendered some of the coupons in payment of the revenue license and was refused. In arriving at the conclusion that the license was a tax payable in the tendered coupons, this Court said:

> "The payment required as a preliminary to the license is in the nature and form of a tax, and is a due to the state which it may demand and exact from every one of its citizens who either will or must follow some business avocation within its limits, to the pursuit of which the assessment is made a condition precedent. It is an occupation tax, for which the license is merely a receipt and not an authority, except in that sense, because it is laid and collected as revenue, and not merely as incident to the general police power of the state, etc. * * *.
>
> "That the party complying with the statutory conditions is entitled as of right to the license, is conclusive that the payment is a tax laid for revenue and not an exaction for purposes of regulation. (Citing cases). The occupation, which is the subject of the license, is lawful in itself, and is only prohibited for the purpose of the license; that is to say, prohibited in order to compel the taking out of a license, and the license is required only as a convenient method of assessing and collecting the tax." (Citing authorities).

Identical views respecting the character of revenue licenses were expressed in *Home Insurance Co.*

v. Augusta, 93 U. S. 116, 23 L. ed. 825, and License Tax Cases, 5 Wall. 462, 18 L. ed. 497.

The character of the license at bar was found by the Washington Supreme Court to be the same as those in the foregoing cases (R. 51).

Pacific Tel. & Tel. Co. v. Seattle, 72 Wash. Dec. 503, 506 (R. 48).

In *Postal Tel. & Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, this Court held that the payment of revenue license exacted as a condition precedent to continuance in business in the City, did not interfere with the right or franchise of telegraph companies under acts of Congress to construct and operate lines along post roads under the Post Roads Act of 1866.

> "That this license," said Justice Shiras, "is not a condition upon which the right to do business depends, but is a tax, is shown by the case of *Home Insurance Co. v. Augusta*, 93 U. S. 122."

Refer also to:

Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 280.

Judge Cooley says:

> "When the tax takes the form of a tax on the privilege of following an employment, convenience in collection will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the tax as a condition to the right to carry on the business at all."
>
> Cooley on Taxation, 4th edition, par. 1716.

B. APPELLANT'S FRANCHISE IS NEITHER A LICENSE OF SUCH CHARACTER AS AUTHORIZES IT TO CARRY ON THE LIGHT AND POWER BUSINESS IN THE CITY NOR AN EXEMPTION FROM LICENSE OR OCCUPATION TAXATION.

The point is made by appellant beginning at page 80 of its brief that its franchise is a license to carry on its business which is impaired or destroyed by the ordinance requirement of a revenue license.

The granting clause of its franchise reads as follows:

> "That there be and hereby is granted to S. L. Shuffleton, his successors and assigns (appellant is his assignee) the right, authority and franchise, on the conditions and for the considerations in this ordinance expressed, to construct, maintain and operate equipment and apparatus for an underground electric system, and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets, alleys and public places of the City of Seattle. This right, authority and franchise is intended to apply to all streets, alleys and public places of said city, now or hereafter existing, subject to the terms and conditions hereinafter expressed; and said grantee, his successors and assigns, by accepting this ordinance, covenant that within three years from the approval of this ordinance he or they will have in operation a system extending to all

streets and parts of streets now lighted by electricity." (Appellant's Br., p. 82)

The ordinance contains no agreement on the part of the grantee to pay anything for the privileges granted. No obligation to render service to the public is expressly stipulated. No agreement concerning rates appears. There is an entire absence of any agreement looking to the exemption of the grantee, or successors, from taxation of any kind. If there is such exemption, appellant has failed to point it out.

Exactly the same point was raised in *Memphis Gas-Light Co. v. Taxing District of Shelby County*, 109 U. S. 398, 27 L. ed. 976. There, the State had granted plaintiff in error an operating franchise for the establishment and operation of gas works in the City of Nashville. Afterwards the Taxing District by authority of a State law and as a condition precedent to the continuance of plaintiff's business, exacted of it a license tax under criminal penalty for failure to pay the same. The following quotation at p. 400 (109 U. S.) puts the question and furnishes the answer:

> "The argument of counsel is that if no express contract against taxation can be found here it must be implied, because to permit the state to tax this company by a license tax for the privilege granted by its charter, is to destroy that privilege.
>
> "But the answer is, that the company took its charter subject to the same right of taxation in the state that applies to all other privileges and to all other property. If it wished or intended

to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of its business, it should have required a provision to that effect in its charter.

"The Constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the states. That is left to the state constitution and state laws."

Again, the decision of this Court in *St. Louis v. United Railways Co.*, 210 U. S. 266, 52 L. ed. 1054, cited and quoted from by the Washington court (R. 40), is decisive against appellant. That case proceeded in part upon the principle that a franchise or right to occupy the streets of a city is not identical with the business or occupation of the grantee, and in part upon the principle that exemption from taxation must clearly and expressly appear; any doubt of exemption being fatal to the claim.

See also:

Nebraska Tel. Co. v. Lincoln, 82 Neb. 59, 117 N. W. 284.

C. In Any Event, the City Never Had, Nor Has It, Any Authority to Contract Away Its Power of Taxation.

The appellant has not, and can not, point to any provision of the Washington Constitution, legislative enactments or the City Charter conferring upon the City authority to contract away its power of taxation. Indeed, the public policy of the State is the

other way. The Washington Constitution, Article VII, Section 4, contains the following:

> "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party."

The Washington court in *Pacific Telephone & Telegraph Co. v. Everett*, 97 Wash. 259, made the following pointed comment at page 269:

> "While it (The City of Everett) may not surrender the right of regulation necessary to the public health and safety, or the *general taxing power* (Const., Art. 7, §4), it can make a valid and binding contract concerning the terms upon which the grantee may make use of public places; such a contract as cannot be changed or altered at the will of the city without the consent of the other party thereto."

Lacking power to grant such exemption, any contract purporting to do so would be void.

> *McTwiggan v. Hunter*, 19 R. I. 265, 33 Atl. 5.

Fourth. **The ordinance definition of "gross income" as applied to the appellant is neither in fact nor in law vague, indefinite or uncertain.**

Since "the province of construction lies wholly within the domain of ambiguity" (*Hamilton v. Rathbone*, 175 U. S. 414, 44 L. ed. 219), the Washington Supreme court approved the definition without construction. The question then comes to this Court

without the benefit of state construction, if any construction be necessary.

This Court has marked the lines of its judicial duty in such circumstances.

> "So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed (*United States ex rel. Atty. Gen. v. Delaware & H. Co.*, 213 U. S. 366, 407, 408, 53 L. ed. 836, 848, 849, 29 Sup. Ct. Rep. 527); and it is to be presumed that state laws will be construed in that way by the state courts."
>
> *Fox v. Washington*, 236 U. S. 273, 277, 59 L. ed. 573, 575.

> "If the state court has not otherwise construed it, and it is susceptible of an interpretation which conforms to constitutional requirements, doubts must be resolved in favor of, and not against, the state."
>
> *Toombs v. Citizens Bank*, 281 U. S. 643, 647, 74 L. ed. 1088, 1090.

Where a state statute is susceptible of a construction which will render it constitutional, all doubt is resolved in favor of its constitutionality in the absence of any construction by the state court.

> *South Utah M. & S. v. Beaver County*, 262 U. S. 325, 331, 67 L. ed. 1004, 1008.

In the absence of applicable state decisions, this tribunal will be guided by generally accepted principles of construction which have been recognized and acted upon by this Court.

Pacific Company v. Johnson, 285 U.S. 480, 489, 76 L. ed. 893, 896.

"The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

Hooper v. California, 155 U. S. 648, 657, 39 L. ed. 297, 301.

The courts may resolve to clearness a vague statute imposing a license tax.

Southeastern Express Co. v. Moler, 264 U. S. 535, 539, 68 L. ed. 836, 839.

This court has also set the limits of constitutional attacks upon state legislation.

A litigant can not invoke a constitutional objection to a part of a statute not applicable to his own particular case.

Southern R. Co. v. King, 217 U. S. 524; 54 L. ed. 868;

Engel v. O'Malley, 219 U. S. 128; 55 L. ed. 128;

Standard Stock Food Co. v. Wright, 225 U. S. 540; 56 L. ed. 1197;

Rosenthall v. People, 226 U. S. 260; 57 L. ed. 212;

Darnell v. Indiana, 226 U. S. 390, 57 L. ed. 267.

Unless a litigant's rights are directly involved, the court will postpone inquiry into constitutional questions which are separable therefrom until they are met upon a question directly at issue unless the unconstitutional feature of it, if it exists, is of such a character as to render the entire act void.

New York C. & H. R. R. Co. v. U. S., 212 U. S. 481, 53 L. ed. 613.

"A law can not be declared invalid at the instance of one not affected by it."

Williams v. Walsh, 222 U. S. 415, 423, 56 L. ed. 253, 256.

The objection that a statute is too vague to be valid is available only to one whom it concerns.

U. S. v. Wurzbach, 280 U. S. 396, 74 L. ed. 508.

"In assailing the constitutionality of a state statute, the burden rests upon appellant to establish that it infringes the constitutional guaranty which he invokes."

Toombs v. Citizens Bank, supra.

"A litigant can be heard to question a statute's validity only when, and so far as, it is being or is about to be applied to his disadvantage."

Utah Pr. & Light Co. v. Pfost, 286 U. S. 165, 186, 76 L. ed. 1038, 1049.

A statute can not be held void for uncertainty if any practical or sensible or reasonable construction can be given it. Mere difficulty in ascertaining its meaning or the fact that it is susceptible to interpretation will not render it nugatory. Mere difficulty in construction does not justify courts in disregarding it, and it is their duty to endeavor by every rule of construction to ascertain the meaning of, and give full force and effect to, every enactment of the legislature not obnoxious to constitutional prohibitions.

State ex rel. Crow v. Westside R. Co., 146 Mo. 155, 47 S. W. 959;

Adams v. Greene, 182 Ky. 504, 206 S. W. 759;

State v. Livingston Concrete B. & M. Co., 34 Mont. 570, 87 Pac. 980;

State ex rel. Forchheimer v. LeBlond, 108 Ohio St. 41, 140 N. E. 491;

State v. Dvoracek, 140 Iowa 266, 118 N. W. 399;

Coggins v. Ely, 23 Ariz. 155, 202 Pac. 391;

Pacific Coast Dairy v. Police Ct. of San Francisco, 214 Cal. 668, 8 Pac. (2d) 140, 80 A. L. R. 1217.

"Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them, and most effectually accomplish these objects."

Cliquot v. U. S., 70 U. S. 114, 145, 18 L. ed. 116, 121;

Royall v. Virginia, 116 U. S. 572, 583, 29 L. ed. 735, 738.

"The intention (of the legislature to tax) being plain, the inartificiality of the law should not result in its overthrow."

Alaska Mex. Gold Min. Co. v. Terr. of Alaska (C. C. A.) 236 Fed. 64, 69—citing *Johnson v. So. Pac. Co.*, 196 U. S. 1, 49 L. ed. 363;

U. S. v. Stowell, 133 U. S. 1, 33 L. ed. 555;
Cliquot v. U. S., 3 Wall. (70 U. S.) 114,
18 L. ed. 116.

With the foregoing principles in mind, we now turn to the criticized portion of the ordinance, the pertinent provisions of which are:

"Section 2. *Definitions*: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

"GROSS INCOME: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not)* by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses." (R. 18)

"Section 5. *Occupations Subject to Tax*—

*(In the record a comma has been erroneously inserted immediately following the first parenthetical matter appearing in the definition of gross income. This comma does not appear in the original ordinance or in the copy thereof attached to the original of appellant's amended complaint).

Amounts: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

* * * * * * * * *

"(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year. * * *"

"Gross income," as above delimited, was borrowed with some change from Section 959, West Virginia Code, 1932. The Act in which it appears has been in force there for many years, and has twice been before this Court.

Hope Natural Gas Co. v. Hall, 102 W. Va. 272, 274 U. S. 284 (Upholding tax on gross income of a natural gas company);
United Fuel Gas Co. v. Hallanan, 87 W. Va. 396, 257 U. S. 277.

In neither case was the definition criticized or in issue.

Substantially similar definitions have found favor in legislative halls of the States of Mississippi (Emergency Rev. Act of 1932) and Washington (Session Laws, 1933, Ch. 191, Sec. 1, Subd. (6)).

In Paragraph I of the amended complaint, appellant alleges:

> "* * * that plaintiff as such corporation has been and is now engaged in the business of selling and furnishing electric light and power to the public for hire in the City of Seattle and the State of Washington * * *." (R. 1)

Appellant also says:

> "* * * Appellant, as a public utility corporation, has been and now is actively engaged in the business of selling and furnishing electric light and power, within the definition thereof contained in the foregoing ordinance * * *." (Br. 12).

Since the appellant is engaged in the business of selling light and power, that is, electrical energy for light and power purposes, it is concerned only with that portion of the definition quoted as follows:

> "GROSS INCOME: The value proceeding or accruing from the sale of tangible property * * * without any deduction on account of the cost of the property sold; the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

It is not satisfied with the use of the word "value," contending that it is a word of indefinite meaning; that it may mean "cost price," "sale price" or "net profit" (Br. 88). A gem from the pen of the beloved and respected Mr. Justice Holmes is helpful at this point:

> "A word is not a crystal, transparent and un-

changed; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Towne v. Eisner, 245 U. S. 418, 425, 62 L. ed. 372, 376.

And so the word "value" may and sometimes does mean "price," depending upon the connection in which it is used. "Price" is a synonym. *S. E. Exp. v. Nightingale*, 33 Ga. 515, 126 S. E. 915. "Value" is the first meaning ascribed to the word "price" in Webster's New International Dictionary (1931). From Funk and Wagnall's New Standard Dictionary of the English Language (1925) we learn that, in political economy, value, in a restricted sense, is market price. In The New Century Dictionary (1927) we find that value is the worth of a thing, measured by the amount of other things for which it can be exchanged, or as estimated in terms of a medium of exchange. George Crabb, in his "English Synonyms Explained," page 756, says that price is the measure of the value received from a sale; it is the measure of value or worth.

Justice Holmes, in *Int. Harv. Co. v. Ky.*, 234 U. S. 216, 222, 58 L. ed. 1284, 1287, defines value thus:

"Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain."

The "price," the "common denominator," received by the appellant is, therefore, the "value" which proceeds or accrues to it from the sale of its property. In

its case the common denominator, the price, is fixed by law.

Under Rem. Rev. Stat., § 10363, every electrical company is required to file with the Washington Department of Public Works (the regulatory body) and to keep open to public inspection, its schedule of rates and charges for its product or service. The rates so fixed are subject to change by action of the Department upon order after hearing upon its own motion or upon complaint. By the provisions of Rem. Rev. Stat., § 10365, the Company is forbidden under penalty to charge, demand, collect or receive a greater or less or different compensation for any service rendered than the rates and charges specified in the schedule or as changed by the Commission (R. 2, Complaint IV) (*Idem*, §10443, §10444).

It results, then, that the value proceeding or accruing to the appellant from the sale of its property, electrical energy, is the ascertained and fixed rate or price which it receives from the consumer and can be nothing else. The value of its service is well defined by law.

Again, the word "value" is inseparably connected with the word "sale." "Value" must accrue from "sale" of property. In the popular mind, and in law, "sale" means "a transmutation of property from one man to another in consideration of some price" (2 Bl. 446).

> "To constitute a valid sale there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the

buyer; (4) *a price in money*, paid or promised." (Italics ours) Benj. Sales, pp. 1 and 2.

A sale is "competent parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject matter of the sale, and the price to be paid therefor." *Gardner v. Lane*, 12 Allen, 39, 43. The foregoing definitions were taken from *Butler v. Thompson*, 92 U. S. 412, 414, 23 L. ed. 684, 685.

> "A sale, *ex vi termini*, is a transfer of property from one man to another. It is a contract to pass rights of property *for money*." (Italics ours).
>
> *Turner v. Ogden*, 1 Black (66 U. S.) 450, 456; 17 L. ed. 203, 205.

> "* * * 'sale' is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties, to give and to pass rights of property *for money—which the buyer pays or promises to pay* to the seller for the thing bought and sold." (Italics ours)
>
> *Williamson, et al. v. Berry*, 8 How. 495, 544, 12 L. ed. 1170, 1191.

Electrical energy is property. *Utah Pr. & Lt. Co. v. Pfost*, 286 U. S. 165, 180, 76 L. ed. 1038, 1046. The value, therefore, which proceeds or accrues to the appellant from the transfer of that property is a definite sum of *money*.

Appellant complains, however, that the value which accrues to it may, within the meaning of the definition, be its "net profit" rather than the gross amount received. From what has gone above, and also from the last clause of the definition of gross income, dis-

allowing deductions for costs or expenses of any kind, it is plain that "value" means the gross receipts.

The word value was used looking to the time when businesses wholly or partly engaged in barter or exchange might be brought under the terms of the ordinance by amendment. When that time comes, provision will be made for determining "value" accruing from barter or exchange.

Notwithstanding that the portion of the definition last quoted clearly suffices to cover appellant's situation, it endeavors to have applied to itself the following portion:

> "and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness, or stocks and the like)."

Obviously this portion is intended as an omnibus to cover receipts by any name derived from any transaction not included in or covered by the words "the value proceeding or accruing from the sale of tangible property or service." It covers and includes rentals from leased chattels, receipts in the form of royalties, fees or other emoluments, or arising out of the investment of capital in the business engaged in.

While sharply criticizing the use of the words "receipts * * * by reason of the investment of capital in

the business engaged in," the appellant does not allege, nor can it point to anything in the record or as matter of judicial notice, that in the business of selling electrical energy for light and power purposes it receives any *receipts* other than the value or price it receives from the sale of energy. It is not alleged or shown that it receives rentals, royalties, fees or other emoluments.

Appellant says further that a portion of its receipts is due to the use of real estate; that it has equipment of the value of millions of dollars housed in, and to a large part permanently affixed to buildings which are a part of the realty.

> "Who can determine the proportion of the receipts from any electric light and power business which are not attributable to the use of real property? * * * How is the taxpayer to know? How may the amount be determined?" (Br. 89).

Of course if an unascertainable portion of its receipts is due to the use of its property in the business, still that portion is simply a return to it of part of the cost of production. The use of its real estate is as much an element in its production costs as is the purchase of materials, labor expenses and other items. It receives no receipts for the use of real estate as such. Receipts from its customers arise or accrue *from the sale* of electrical energy, which after all is the only matter of concern to the public. There is no allegation or showing that the appellant has leased or rented any of its real property or granted an easement or license therein.

If the portion of the definition commencing with the

words "and receipts" and ending with the words "however designated" is vague, indefinite or uncertain, it is of no moment to the appellant, for as to that it is mere surplusage, and if invalid affords appellant, within the rules above stated, no ground for complaint.

If the parenthetical matter: "(excluding receipts or proceeds from the use or sale of real property or any interest therein, * * *)" is so vague, indefinite or uncertain that its meaning can not be reasonably fathomed, that is of no avail to appellant, even though applicable to its situation.

In a case of somewhat similar circumstances, this court in *Utah Pr. & Light Co. v. Pfost*, 286 U. S. 165, 185, 76 L. ed. 1038, 1048, pointed out:

> "The primary object of the statute under review, plainly, is to raise revenue. The exemption made by § 5 and the provisions for carrying that exemption into effect are secondary. We find no warant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity." (Citing cases)

This pronouncement was made upon a statute which

contained a provision saving the remainder of the act from any adjudication of invalidity of a part thereof. The ordinance at bar contains the following:

> "Section 23. *Effect of Partial Invalidity*: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect." (R. 26)

Appellant is exercised over the penalties for disobedience, and states that it must *guess* at "gross income" at the risk of incurring heavy fine and imprisonment (Br. 91). Undue alarm is expressed, for it appears in Section 22 of the ordinance that "It shall be unlawful * * * for any person to make any *false* or fraudulent application or return or any *false* statement or representation in, or in connection with, any such application or return, or to aid or abet another in any attempt to *evade* payment of the fee or tax, or any part thereof, * * * or to testify *falsely* upon any investigation of the correctness of a return, or upon the hearing of any appeal, * * *." (R. 25). No citation of authority is needed to show that mere mistake is not a violation; that there must be an intentional falsity, since the word "false" and the word "fraud" both imply intent, or at the very least, gross negligence.

If courts should insist upon the absolute in the phrasing of revenue measures, we venture to say that neither the United States, the States, nor any other taxing unit could survive. Mr. Justice Sutherland

remarked in the *Pfost* case, *supra*, at p. 190 (286 U. S.):

> "If, for example, absolute exactness of determination in respect of net income, deductions, valuation, losses, obsolescence, depreciation, etc., were required in cases arising under the federal income tax law, it is safe to say that the revenue from that source would be much curtailed. The law, which is said not to require impossibilities, must be satisfied, in many of its applications, with fair and reasonable approximations."

We point out that appellant was courageous enough to take the risk of making its first report or return of gross income to the City Comptroller on July 1, 1932, when, under written protest, it applied for a license, made a return of its gross income and paid the first monthly installment of its tax in the sum of $9697.75, computed upon the gross income reported, at the tax rate provided (R. 8, 27). According to the amended complaint the City did not dispute the amount of gross income returned, but to the contrary asserted a claim to further monthly installments of the tax in like amount (R. 16).

So. Realty Corp. v. McCallum, 65 Fed. (2d) 934, 938.

We expect to file briefs in the related cases, *The Pacific Tel. & Tel. Co. v. City of Seattle*, No. 364, October Term, 1933, and *Seattle Gas Co. v. City of Seattle*, No. 359, said term. If permissible in this court, we desire that any applicable new matter presented

therein should be considered in determining this cause.

For the reasons herein pressed upon the Court, the judgment of the Supreme Court of the State of Washington ought to be affirmed.

Respectfully submitted,

A. C. VAN SOELEN,
Corporation Counsel.

WALTER L. BAUMGARTNER,
Assistant.

C. V. HOARD,
Counsel for Appellee.

515 County-City Building,
Seattle, Washington.
December, 1933.

APPENDIX A

ORDINANCE No. 62662
(Council Bill 53240)

AN ORDINANCE relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. *Exercise of Revenue License Power:* The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue:

Section 2. *Definitions*: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

Person or Persons: Persons of either sex, firms, co-partnerships, corporations and other associations of natural persons, whether acting by themselves or by servants, agents or employes.

Taxpayer: Any person liable to the license fee or tax imposed by this ordinance.

Tax Year or Taxable Year: The year commencing March 1st and ending on the last day of February of the following year, or, in lieu thereof, the taxpayer's fiscal year when permission is obtained from the City Comptroller to use the same as the tax period.

Section 3. *"Occupation License" Required*: After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an "Occupation License."

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his "Occupation License" so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 4. *License Tax Year*: All "Occupation

Licenses" shall be for the tax year for which issued and shall expire at the end of such tax year.

Such "Occupation License" and the fee or tax therefor hereby imposed shall be for the year commencing March 1st and ending on the last day of February of the following year; Provided, however, that if the taxpayer in transacting his business keeps the books reflecting the same for a fiscal year not based on the calendar year, he may, with the assent of the City Comptroller, obtain his license for the period of his current fiscal year which shall be deemed his tax year, and pay the fee or tax computed upon his gross income made during his fiscal year (next preceding his tax year) covering his accounting period as shown by the method of keeping the books of the business.

Section 5. *Occupations Subject to Tax—Amount*: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

(a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water

for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

(d) Upon every person conducting or engaged in the business of supplying steam heat or power to the public for hire, a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Fifty ($50.00) Dollars per tax year.

(e) Upon every person engaged in the business of operating or conducting a fire alarm system, district telegraph or burglary and police alarm system for hire, a fee or tax equal to two per cent (2%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Hundred ($100.00) Dollars per tax year.

Section 6. *City of Seattle Subject to Tax*: Sub-

divisions (b) and (c) of Section 5 shall, as far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

Section 7. *Occupations and Privileges Subject to Tax Amount*: There are hereby levied, and shall be collected, annual license fees or occupation taxes against the persons on account of the business activities or privileges and in the amounts hereinafter fixed, as follows:

(a) Upon every person engaged in or carrying on the business of operating any motor vehicle for the transportation of passengers for hire at rates per trip or based on the distance and/or time employed, and driven by the owner or his representative under the routing or direction of the passenger or person hiring the same, the following tax or fee:

When such vehicle does not stand in or upon any public street, alley or other public place, or upon any place open to the public for the use of vehicles while awaiting employment:

For each such vehicle having a seating capacity of seven (7) persons, or less, Fifteen ($15.00) Dollars per tax year;

For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Twenty ($20.00) Dollars per tax year;

For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, Thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of

sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, Seventy-two ($72.00) Dollars per tax year.

When such vehicle stands in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment:

For each such vehicle having a seating capacity of seven (7) persons, or less, Thirty ($30.00) Dollars per tax year;

For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, forty ($40.00) Dollars per tax year;

For each such vehicle having a seating capacity of sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, inclusive, Seventy-two ($72.00) Dollars per tax year.

In determining the seating capacity of any such vehicle the driver and conductor shall be included.

(b) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the purpose of sight-seeing or showing points of interest, and not elsewhere herein mentioned and licensed, a fee or tax in the same amount

as required for the business of operating the vehicles mentioned in Sub-Section (a) of this section, provided, however, that the vehicles mentioned in this subsection may be operated by the licensee at rates based on time employed, whether for sight-seeing purposes or not (known as "for hire" service) without securing in addition the license required by said Sub-Section (a).

In determining the seating capacity of any such sight-seeing vehicle the driver and announcer shall be included.

(c) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the transportation of passengers for hire between common carrier passenger terminals or depots and hotels, and not elsewhere herein mentioned and licensed, for each vehicle Sixty ($60.00) Dollars per tax year.

(d) Upon every person engaged in or carrying on the business of letting the use of any motor vehicle at rates per trip, or based on distance travelled, or time employed, and to be driven and routed or directed by the person or persons hiring or renting the same, the following tax or fee:

For each such vehicle which does not stand in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment, Fifteen ($15.00) Dollars per tax year;

For each such vehicle standing in or upon any public street, alley or other public place, or any place open to the use of the public for vehicles while await-

ing employment, Thirty ($30.00) Dollars per tax year.

(e) Upon every person engaged in or carrying on the business of operating any vehicle drawn by or attached to any motor driven vehicle and used for the transportation of baggage, express, freight, household goods, merchandise or materials for hire, and which vehicle receives or discharges baggage, express, freight, household goods, merchandise or other materials at points within or without the City, and which does not operate over a defined route:

For each such vehicle of not more than 1 ton capacity, $3.00 per tax year.

For each such vehicle of not more than 2 tons capacity, $6.00 per tax year.

For each such vehicle of not more than 3 tons capacity, $9.00 per tax year.

For each such vehicle of not more than 4 tons capacity, $12.00 per tax year.

For each such vehicle of not more than 5 tons capacity, $15.00 per tax year.

For each such vehicle of not more than 6 tons capacity, $18.00 per tax year.

For each such vehicle of more than 6 tons capacity, $21.00 per tax year.

No license required by this ordinance for the operation of any vehicle shall be issued unless the licenses and/or permits therefor required by law or ordinances other than this have been granted.

Section 8. *Tax Apportioned for Year 1932*: For the remainder of the tax year 1932, ending on the last day of February, 1933, the fees or taxes herein

imposed shall be apportioned in the ratio of said remainder to a full tax year.

Section 9. *Exceptions and Deductions*: There shall be excepted and deducted from the total gross income upon which the license fee or tax is computed so much thereof as is derived from transactions in interstate or foreign commerce, or from business done for the government of the United States, its officers or agents, and any amount paid by the taxpayer to the United States, the State of Washington, or the City of Seattle, as excise taxes levied or imposed upon the sale or distribution of property or services.

Nothing in this ordinance shall be construed as requiring a license, or the payment of a license fee or tax, or the doing of any act, which would constitute an unlawful burden or interference in violation of the Constitution or laws of the United States, or which would not be consistent with the Constitution or laws of the State of Washington.

Any person subject to the payment of a license fee or tax under the provisions of any ordinance of the City, other than this, on account of engaging in any activity for which he is liable to tax hereunder, may deduct the amount of such fee or tax from the amount of fee or tax imposed by this ordinance on account of such activity, but such person shall nevertheless, in the manner herein provided for, apply for and procure an "Occupation License."

Section 10. *Application or Return for License*: On or before the 1st day of July, 1932, and thereafter on or before the first day of each tax year, every taxpayer shall apply to the City Comptroller for an "Oc-

cupation License" upon blanks or forms of return to be prepared and provided by him requesting such information as may be necessary to enable him to arrive at the lawful amount of the fee or tax. The taxpayer shall, in a legible manner, write in such blank or form of return the information required and shall sign the same and by affidavit at the foot thereof shall swear or affirm that the information therein given is full and true and that he knows the same to be so.

Every such application or return shall be accompanied by a remittance by bank draft, certified check, cashier's check or money order, payable to the City Treasurer, or in cash, in the amount of the tax or fee or installment thereof required by the provisions hereof.

If the applicant be a partnership, the application or return must be made by one of the partners; if a corporation, by one of the officers thereof; if a foreign corporation, co-partnership or non-resident individual, by the resident agent or local manager of said corporation, co-partnership or individual.

Section 11. *Monthly and Quarterly Payment of Tax*: Where the amount of the license fee or tax is based upon gross income, the taxpayer may pay his fee or tax in equal monthly installments during the life of his license, each such installment to be paid on or before the 10th day of the month. In all other cases the taxpayer may pay his fee or tax in equal installments during the life of his license, each such installment to be paid on or before the 1st day of March, the 1st day of June, the 1st day of September and the 1st day of December, respectively.

Section 12. *When Tax Based on Current Year—Commencement of Business During Tax Year*: Where a business, occupation or pursuit subject to tax upon gross income has not been carried on for the full calendar or fiscal year next preceding the tax year for which license is required, the license fee or tax shall be paid monthly in installments during the life of the license on or before the 10th day of the month, and shall be based upon the gross income for the month next preceding that in which payment is due. In such cases the taxpayer shall make monthly returns similar to the annual returns provided for herein on or before the 10th day of the month, under oath or affirmation covering the business of the previous month.

In all other cases where a person commences during any tax year to engage in any business, occupation, pursuit or privilege, he shall be entitled to a license for the remainder of such tax year for the required fee apportioned in the ratio of said remainder to a full tax year.

Section 13. *Monthly payments—License Prerequisite*: In any case where the taxpayer pays his license fee or tax monthly he shall nevertheless first procure his "Occupation License" in the manner herein required before commencing or continuing in business, and shall pay the minimum fee or tax therefor, which shall be credited against future installments.

Section 14. *Sale or Transfer of Business*: Upon the sale or transfer during any tax year of a business on account of which a fee or tax is hereby required, the purchaser or transferee shall, if the fee or tax

has not been paid in full for said year, be responsible for its payment for that portion of said year during which he carries on such business.

Section 15. *Taxpayer to Keep Books and Records —Returns Confidential*: It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

Section 16. *Comptroller to Investigate Returns*: If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the

correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary.

Section 17. *Over or Underpayment of Tax*: If the City Comptroller upon investigation or upon checking returns finds that the fee or tax paid on any of them is more than the amount required of the taxpayer, he shall refund the amount overpaid by a warrant upon the General Fund. If the City Comptroller finds that the fee or tax paid is less than required, he shall send a statement to the taxpayer showing the balance due, who shall within three (3) days pay the amount shown thereon.

Section 18. *Remedy for Non-payment of Tax*: If any taxpayer fails to apply for license, or make his return, or to pay the fee or tax therefor, or any part thereof, within three (3) days after the same shall have become due, the City Comptroller shall ascertain the amount of the fee or tax or installment thereof due and shall notify such taxpayer thereof, who shall be liable therefor in any suit or action by the City for the collection thereof. The City Comptroller shall also notify the Corporation Counsel in writing of the name of such delinquent taxpayer and the amount due from him and said officer shall, with the assistance of the City Comptroller, collect the same by any appropriate means or by suit or action in the name of the City.

Section 19. *Appeals to City Council*: Any taxpayer aggrieved by the amount of the fee or tax found by the City Comptroller to be required under the provisions of this ordinance, may appeal to the City Council from such finding by filing a written notice of appeal with the City Clerk within five (5) days from the time such taxpayer was given notice of such amount. The Clerk shall, as soon as practicable, fix a time and place for the hearing of such appeal, which time shall be not more than ten (10) days after the filing of the notice of appeal, and he shall cause a notice of the time and place thereof to be delivered or mailed to the appellant. At such hearing, the taxpayer shall be entitled to be heard and to introduce evidence in his own behalf. The City Council shall thereupon ascertain the correct amount of the fee or tax by resolution and the City Clerk shall immediately notify the appellant thereof, which amount, together with costs of the appeal, if appellant is unsuccessful therein, must be paid within three (3) days after such notice is given.

The President of the City Council, or the Chairman of any committee thereof before which the appeal is to be heard, may, by subpoena, require the attendance thereat of any person, and may also require him to produce any pertinent books and records. Any person served with such subpoena shall appear at the time and place therein stated and produce the books and records required, if any, and shall testify truthfully under oath administered by the Chairman in charge of the hearing on appeal as to any matter required

of him pertinent to the appeal, and it shall be unlawful for him to fail or refuse so to do.

Section 20. *Comptroller to Make Rules:* The City Comptroller shall have the power, and it shall be his duty, from time to time, to adopt, publish and enforce rules and regulations not inconsistent with this ordinance or with law for the purpose of carrying out the provisions thereof, and it shall be unlawful to violate or fail to comply with, any such rule or regulation.

Section 21. *Licenses—Posting—Unlawful Use Of:* All licenses issued pursuant to the provisions of this ordinance shall be kept posted by the licensee in a conspicuous place in his principal place of business in the City, except that all licenses for the operation of a vehicle shall be attached in a conspicuous place upon the right hand side of such vehicle in a suitable holder to be furnished by the City Comptroller upon the payment of a fee of Twenty-five ($.25) Cents.

No person to whom a license has been issued, pursuant to this ordinance, shall suffer or allow any other person chargeable with a separate license to operate under or display his license, nor shall such other person operate under or display such license.

Section 22. *False Returns, etc.:* It shall be unlawful for any person liable to tax hereunder to fail or refuse to make application or return for a license or to pay the fee or tax or installment thereof when due, or for any person to make any false or fraudulent application or return or any false statement or representation in, or in connection with, any such application or return, or to aid or abet another in any at-

tempt to evade payment of the fee or tax, or any part thereof, or for any person to fail to appear and/or testify in response to subpoena issued pursuant hereto, or to testify falsely upon any investigation of the correctness of a return, or upon the hearing of any appeal, or in any manner to hinder or delay the City or any of its officers in carrying out the provisions of this ordinance.

Section 23. *Effect of Partial Invalidity*: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect.

Section 24. *Penalty*: Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 25. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed the City Council the 23rd day of May, 1932,

and signed by me in open session in authentication of its passage this 23rd day of May, 1932.

JAMES SCAVATTO,
President Pro Tem of the City Council.

Approved by me this 25th day of May, 1932.

PHILIP TINDALL,
Acting Mayor.

Filed by me this 25th day of May, 1932.

Attest: H. W. CARROLL,
City Comptroller and Ex-Officio City Clerk.

(Seal) By E. M. STREET,
Deputy Clerk.

Published May 31, 1932.

H. W. CARROLL,
City Comptroller and Ex-Officio City Clerk.
By E. M. STREET,
Deputy Clerk.